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**BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.**

**FEB 28 1997**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of )  
Closed Captioning and Video )  
Description of Video Programming ) MM Docket No. 95-176

**COMMENTS OF THE WEATHER CHANNEL**

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### SUMMARY

- I. THE COMMISSION SHOULD GRANT THE WEATHER CHANNEL AN EXEMPTION FROM THE CLOSED CAPTIONING RULES FOR THE FOLLOWING REASONS:
- A. CLOSED CAPTIONING WOULD BE ECONOMICALLY BURDENSOME FOR THE WEATHER CHANNEL BECAUSE IT WOULD IMPOSE EXORBITANT COSTS:
- LIVE STENOCAPTIONING WOULD BE REQUIRED 24 HOURS A DAY
  - THE WEATHER CHANNEL'S AUTOMATED DATA DISSEMINATION SYSTEMS WOULD HAVE TO BE RECALIBRATED -- ASSUMING THAT IS POSSIBLE -- TO ALLOW FOR CAPTION'S THREE SECOND DELAY FROM THE AUDIO
  - UNLIKE OTHER TYPES OF PROGRAMMING, THERE IS NO AUDIENCE FOR OLD WEATHER REPORTS AND THEREFORE, COSTS CAN NOT BE RECOUPED THROUGH REPEATED SHOWINGS
- B. THE WEATHER CHANNEL IS AN INTENSELY TEXTUAL AND GRAPHIC SERVICE THAT IS FULLY ACCESSIBLE TO THE HEARING IMPAIRED. THEREFORE, CAPTIONING THE SERVICE WOULD YIELD ONLY MINIMAL BENEFITS.
- LOCAL WEATHER IS ENTIRELY TEXTUAL
  - EMERGENCY WARNINGS AND BULLETINS ARE ENTIRELY TEXTUAL
  - NATIONAL/INTERNATIONAL WEATHER REPORTS ARE ADEQUATELY CONVEYED THROUGH GRAPHS, LABELS, CHARTS, MAPS, AND SCALES
  - CAPTIONS WOULD OBSCURE IMPORTANT INFORMATION BEING CONVEYED
  - THE WEATHER CHANNEL'S CONTENT IS READILY AVAILABLE ON THE INTERNET AS EVIDENCED BY THE WEBSITE'S POPULARITY
- II. THE COMMISSION SHOULD USE THIS PROCEEDING TO EXEMPT THE WEATHER CHANNEL BECAUSE SECTION 713(d)(1)'S LANGUAGE AND LEGISLATIVE HISTORY:
- ALLOW THE COMMISSION TO EXEMPT "PROGRAMS, CLASSES OF PROGRAMS, OR SERVICES"

- INSTRUCT THE COMMISSION TO "EXEMPT BY REGULATION" USING "INFORMATION COLLECTED DURING THE [AGENCY'S SECTION 713] INQUIRY"

III. THE WEATHER CHANNEL ALSO MERITS AN EXEMPTION BECAUSE IT FALLS WITHIN THE CLASS OF PRIMARILY TEXTUAL SERVICES.

- THE WEATHER CHANNEL'S PROGRAMMING IS CONVEYED PRIMARILY VIA TEXT, GRAPHS, CHARTS, MAPS, ETC.
- AUDIO ACCOMPANIES ONLY NATIONAL AND INTERNATIONAL WEATHER REPORTS AND 70% OF SUCH CONTENT IS COMPREHENSIBLE WITHOUT AUDIO

IV. IN ORDER TO PROVIDE FOR THE EFFICIENT RESOLUTION OF INDIVIDUAL EXEMPTION REQUESTS UNDER SECTION 713(d)(3), THE COMMISSION SHOULD PRESUME THAT CLOSED CAPTIONING OF THE FOLLOWING TYPES OF PROGRAMMING WOULD IMPOSE AN UNDUE BURDEN ON PROGRAMMERS:

- LIVE PROGRAMMING
- PERISHABLE PROGRAMMING
- PROGRAMMING IN WHICH SUBSTANTIALLY ALL NECESSARY AUDIO INFORMATION IS DEPICTED IN ON-SCREEN TEXT AND GRAPHICS
- PROGRAMMING IN WHICH CAPTIONING WOULD DIMINISH THE INFORMATION BEING CONVEYED BY BLOCKING TEXT, MAPS, ETC.

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**COMMENTS OF THE WEATHER CHANNEL**

The Weather Channel respectfully files its comments in the above-captioned proceeding.<sup>1</sup>

**I. DESCRIPTION OF THE WEATHER CHANNEL SERVICE.**

The Weather Channel is a graphically intensive 24 hour, live weather information service. It provides local, national, and international weather information including current conditions, forecasts, and important severe weather bulletins. In addition, The Weather Channel distributes evacuation and emergency shelter information associated with natural disasters and weather-influenced technological hazards such as toxic chemical spills and nuclear power plant emergencies - - providing a critical link to national and worldwide weather events to all consumers. In fact, emergency officials use the service to advise the public

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<sup>1</sup> In the Matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, Notice of Proposed Rulemaking (released January 17, 1997) ("NPRM").

when it is safe to reenter evacuated regions. The American Red Cross, American Lung Association, U.S. Forest Service, Federal Emergency Management Association, and many others have cited the life-saving value of The Weather Channel programming.

The Weather Channel's local weather programming is offered in textual form only, with no commentary by any weatherperson. The audio portion of the local service is merely background music which accompanies scrolling local weather forecasts. Emergency weather warnings and bulletins are also offered only in textual form. Thus, all the critical local and emergency weather programming provided by The Weather Channel is fully accessible to the hearing impaired and, in fact, contains no local audio portion that could be captioned.

Similarly, the national and international programming is displayed through full color maps, charts, scales, and satellite photos of the U.S. and the world. Weather patterns are indicated using arrows and other directional symbols, temperature indicators and other graphics which substantially duplicate weatherperson commentary.

Pictorial examples of The Weather Channel's local, national, and international programming are contained in Attachments A-F.

**II. THE COMMISSION SHOULD EXEMPT THE WEATHER CHANNEL BECAUSE CLOSE CAPTIONING ITS PROGRAMMING WOULD BE ECONOMICALLY BURDENSOME.**

Section 713(d) permits the Commission to exempt "programs, classes of programs, or services" if close captioning would be

economically burdensome.<sup>2</sup> In the NPRM, the Commission interpreted the "economically burdensome" test to require a finding that the "economic burden of captioning . . . outweighs the benefits to be derived from captioning and, in some cases, the complexity of adding the captions."<sup>3</sup> In other words, if the costs or complexity of captioning outweigh the benefits of captioning, then captioning is economically burdensome and an exemption should be granted. The Weather Channel supports this interpretation.

**A. In Order To Promote Efficient Use Of The Limited, Real-Time Closed Captioning Resources Available Today, It Is Essential That The Commission Liberaly Construe The Exemption Provisions Of Section 713(d) (1.**

The Commission properly recognized that there is an insufficient number of qualified captioners to meet the demand that will result from its order in this proceeding for real-time captioning (captioning of live programming, sometimes referred to as "stenocaptioning").<sup>4</sup> That conclusion accords with The Captioning Center's website which notes that stenocaptioning

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<sup>2</sup> See 47 U.S.C. § 613(d) (1).

<sup>3</sup> See NPRM at ¶ 70.

<sup>4</sup> See NPRM at ¶ 113 ("It is evident that there is going to have to be an increase in the resources and individuals involved in the captioning process. [] It is unclear that the number of stenocaptioners with advanced training . . . at the highest quality levels is sufficient at this time to meet the expanded demand for stenocaptioning services that our proposed rules will engender."). See also NPRM at ¶ 108 ("Currently, the number of real time captioners is small.").



takes "years of training in steno" and that "few people have such highly specialized skills."<sup>5</sup> Indeed, The National Captioning Institute recently estimated that there are less than 200 captioners world-wide who are able to caption in real-time.<sup>6</sup> Moreover, a single twenty-four hour, live, unscripted programmer such as The Weather Channel would require approximately 12-14 stenocaptioners<sup>7</sup> which is more than five percent of the estimated world-wide total. Thus, the entire pool of stenocaptioners would be capable of satisfying only eighteen live, 24-hour, unscripted, video programming networks, leaving no resources whatsoever for the many networks -- national, regional, and local -- which provide live, unscripted programming for at least some portion of the day.<sup>8</sup>

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<sup>5</sup> See <http://www.boston.com/wgbh/pages/captioncenter/cclocalnews.html> at 2.

<sup>6</sup> Telephone Interview with Tammie Shedd, Director of Real-Time Operations for the National Captioning Institute (Feb. 24, 1997). See also NPRM at ¶ 24 & n.76 (noting that VITAC, one of the six major suppliers of captioning, estimated that "there are likely to be only about 100 real time captioners nationwide today" while MCS, another major supplier, estimated "that there may be only 500 people in the industry.").

Real-time captioning is a skill different than real-time writing performed by court reporters which allows for a much higher rate of error. In any event, the National Court Reporters Association has only 542 certified real-time reporters on its membership rolls. That would surely be insufficient to satisfy the demand unleashed by this proceeding.

<sup>7</sup> See Part II.B.1, infra (noting that the National Captioning Institute estimates The Weather Channel would need 12-14 full-time stenocaptioners).

<sup>8</sup> The Commission has noted that there are more than 100 national video programmers. See Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, Report, 3

In order to promote an efficient transition to closed captioning of cable programming, the Commission must take into account the shortage of real-time captioners in construing the exemption provisions of Section 713(d)(1). If the Commission construes the exemption provision narrowly, granting only a limited number of exemptions, it would create a chaotic situation in which literally hundreds of programmers are contesting for captioning resources entirely insufficient to serve that many services. In such an environment, the "wrong" services might capture the limited available captioning resources.

For example, consider two services, both of equal value to hearing-impaired persons: Service A provides on-screen textual material that enables hearing-impaired persons to access a majority of the pertinent information necessary to utilize the programming, while Service B provides no alternative means of access for hearing-impaired persons. If the resources existed to caption only one service, we would naturally want Service B to be the one captioned. However, if the Commission takes a minimalist approach to the exemptions and does not grant an exemption to Service A, the chances that the limited captioning resources will be devoted to Service B are significantly reduced.

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Comm. Reg. 1058 at ¶ 73 (1996) ("Report"). Examples of programmers which utilize live, unscripted programming for at least some portion of the day include ESPN, CNN, TBS, TNT, MTV, TNN, CNBC, Bloomberg Information Television, and NET. See NCTA Booklet, Cable Television Developments, (Spring 1996) (listing national and regional video services).

This does not mean, of course, that the Commission must indiscriminately and broadly grant exemptions. Rather, it means that if a programmer has a legitimate claim for an exemption, even if that claim might be considered insufficient in a perfect world in which captioning resources were abundant, the Commission should seriously consider an exemption for that programmer in this instance. Stated another way, the lack of captioning resources should lower the burden of proof, so that programmers that reasonably demonstrate an economic burden or an alternative means of access for the hearing impaired should qualify for an exemption.

**B. Close Captioning Would Impose An Undue Economic Burden Upon The Weather Channel.**

1. The Costs Of Closed Captioning For The Weather Channel Would Be Exorbitant.

Congress specifically instructed the Commission to take into account the "nature and cost of providing closed captions" when considering whether an individual program service is qualified for an exemption.<sup>9</sup> That instruction is highly relevant here because a closed captioning requirement would impose a unique and significant ongoing economic burden on The Weather Channel. This is because The Weather Channel provides live, largely unscripted programming 24 hours a day. Captioning such programming is particularly complex and costly.

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<sup>9</sup> See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183-84 (1996) ("Conference Report") (discussing and adopting House Report, H.R. No. 204, 104th Cong., 1st Sess. (1995)).

Under the Commission's proposed rules, The Weather Channel would have to caption in real-time using stenocaptioners - court reporters who receive enhanced training to enable them to transcribe the audio portion of live programming as it airs.<sup>10</sup> The Commission has found that stenocaptioning costs run between \$120-\$1,200 per hour.<sup>11</sup> The high end of that estimate would produce an annual cost to The Weather Channel of over \$10 million dollars. Even at the low end, the annual cost would be approximately \$1,050,200.<sup>12</sup> That lower estimate is certainly too conservative given the Commission's observation that captioning companies "that charge the most for their services are reported to provide the highest quality and most accurate captioning."<sup>13</sup> Given the need for accuracy in reporting weather information and The Weather Channel's desire to maintain its reputation for high quality service, it is most likely that The Weather Channel's actual costs for 24 hour captioning would be well above the low end estimate. Indeed, the National Captioning Institute and several other captioning services quoted a \$400 hourly rate to

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<sup>10</sup> Approximately four to six months is necessary to impart the necessary skills to an experienced court reporter. See Report at ¶ 50 n.95.

<sup>11</sup> See NRPM at ¶¶ 20 & 115.

<sup>12</sup> The \$1.05 million dollar figure consists of \$120/hour x 24 hours/day x 365 days/year.

<sup>13</sup> See NPRM at ¶ 18. See also NPRM ¶ 115 ("The cost of closed captioning can be expensive, especially for high quality captioning of live programming."); Report at ¶ 46 ("The larger,

The Weather Channel for real-time captioning, with appropriate back-up systems.<sup>14</sup> That price yields a total annual captioning cost in excess of \$3.5 million dollars.

Even if The Weather Channel hired permanent captioning employees, the cost would be exorbitant. According to Tammie Shedd, the Director of Real-Time Operations for the National Captioning Institute, stenocaptioners require an average annual salary of \$55,000 (plus benefits).<sup>15</sup> The National Captioning Institute estimates that The Weather Channel's 24 hour, seven-day-a-week programming format would necessitate 12-14 full-time stenocaptioners (assuming that each stenocaptioner could caption 4-5 hours of live programming per shift)<sup>16</sup> totaling \$660,000-770,000 annually in salary. Those price figures are almost certain to rise significantly because, as noted, there are insufficient stenocaptioning resources to meet today's demand and such demand is sure to increase based on this proceeding.

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more experienced captioning agencies still charge relatively high rates, but are known for their level of quality.").

14 Telephone Interview with Tammie Shedd, Director of Real-Time Operations for the National Captioning Institute (Feb. 24, 1997). The National Captioning Institute's \$400/hour service includes stringent quality controls and on-site technical, engineering, and personnel back-up systems. Id.

15 Telephone Interview with Tammie Shedd, Director of Real-Time Operations for the National Captioning Institute (Feb. 24, 1997) (average salary for stenocaptioners with one to three years experience is \$50,000-\$60,000).

16 See id. It is more likely, however, that stenocaptioners could only caption accurately in 15-minute shifts.

Further, The Weather Channel estimates that its benefit package costs approximately 19-20 percent of an employee's total salary. This adds another \$10,000 to the cost per captioning employee, or a total additional cost of \$120,000-140,000 (12-14 employees X \$10,000). Thus, salary and benefit costs alone are most likely to be well in excess of \$800,000.

In addition to the stenocaptioners, The Weather Channel would need two caption work stations (\$1,000 per station), two personal computers (\$4,000 per computer), captioning software (\$12,000), keyboards (\$3,000), EEG Smart encoders (\$12,000), and monitors/headphones (\$1,000) for a total of \$38,000 in equipment costs.<sup>17</sup> Training requirements also would add significant costs over an initial six to twenty-four month period.<sup>18</sup>

There is another complication that could result in potentially large costs for The Weather Channel. There is a delay associated with the stenocaptioning data stream, *i.e.*, captioning appears two to three seconds after the audio has

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<sup>17</sup> The Commission's estimates for stenocaptioning equipment are \$50,000-\$75,000. See Report at ¶ 50.

<sup>18</sup> The Caption Center's website states that "[o]nce a stenocaptioner is hired, that person trains several more months" in order to be ready to caption live broadcasts. See <http://www.boston.com/wgbh/pages/captioncenter/cclocalnews.html> at 2. Other captioning companies have informed The Weather Channel that it should plan on spending 18-24 months to hire and train in-house stenocaptioners to "caption" its live weather reports.

actually occurred.<sup>19</sup> The Weather Channel uses an automated system for data dissemination which requires real time data. Thus, by the time the captioning appears, the associated graph or picture may no longer be on the screen. The Weather Channel does not have estimates as to the costs associated with building delays into its automated, live broadcast feeds so that captions and video are displayed simultaneously. In fact, it is unclear whether it is possible to integrate delayed data from captioning into an automated real time system. However, in the best case scenario, these costs would be substantial, thereby further increasing the economic burden on The Weather Channel.

2. The Weather Channel May Not Recoup The Costs Of Closed Captioning Via Repeated Airings.

The NPRM notes that "many cable networks cycle their programming, rebroadcasting programs several times over the course of a month or season, which should significantly decrease the actual number of hours of programming to be captioned," thereby lowering overall captioning costs.<sup>20</sup> That statement is totally inapplicable to The Weather Channel. Viewers watch The Weather Channel because of the timeliness of its up-to-the-minute weather reports. Such reports, by their very nature, can air only once. Consequently, The Weather Channel does not

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<sup>19</sup> See NPRM at ¶ 20 (three second delay). The Caption Center's webpage states that real time captioning takes less than five seconds. See <http://www.boston.com/wgbh/pages/captioncenter/cclocalnews.html> at 2.

<sup>20</sup> See NPRM at ¶ 33.

rebroadcast its programming and therefore is unable to amortize the costs of closed captioning over multiple re-airings of the same program as would be possible for movies, sitcoms and other programming which may be re-aired and enjoyed on multiple occasions.<sup>21</sup> The highly perishable nature of The Weather Channel's programming results in each minute of programming having to bear the full costs of captioning as opposed to other programs which may apportion the cost of captioning over several airings. Thus, the costs imposed upon The Weather Channel would be much higher -- on a relative basis -- than those imposed on other services which are able to offer repeat viewing.

In adopting the exemption provision, Congress said that the Commission should consider "the impact [of closed captioning] on the operation of the program provider."<sup>22</sup> The nature of The Weather Channel's programming would result in costs for captioning that would be significant and disproportionate relative to other programmers. By the most optimistic estimates,

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<sup>21</sup> The observations in the NPRM concerning the closed captioning of certain "perishable" sports events such as the NCAA Men's Basketball Tournament are not applicable to weather programming. See NPRM at ¶ 66. These types of sports events, unlike weather programming, may actually be capable of at least a few re-airings. For example, the national networks televise boxing and other sporting events which have already been shown on cable stations such as HBO. In addition, some sporting events draw very large viewing audiences and, therefore, command significant advertising revenues. This fact also distinguishes weather programming.

<sup>22</sup> See Conference Report at 183 (discussing and adopting the House Report).



these costs would exceed a million dollars per year, easily enough to adversely impact The Weather Channel's operation. Thus, The Weather Channel qualifies for an exemption.

**C. Close Captioning The Weather Channel's Programming Would Provide Little or No Benefit to Deaf or Hearing-Impaired Viewers.**

Not only would closed captioning be extremely burdensome for The Weather Channel, it would provide little if any benefit to the hearing impaired. For this reason, as well, an exemption is warranted for The Weather Channel.

**1. The Weather Channel's Local Programming And Emergency Weather Alerts Are Entirely Textual And Therefore Fully Accessible To The Deaf And Hearing Impaired.**

The Weather Channel's local programming is entirely textual and is accompanied only by music with no audio voice-overs whatsoever.<sup>23</sup> Local weather programming airs every ten minutes in lieu of the national feed and consists of full screen text and graphics setting forth current temperatures, radar, dewpoints, humidity levels and weather forecasts.<sup>24</sup> Moreover, within the next three months, The Weather Channel plans to roll out a new local weather feature which will overlay the national feed and

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<sup>23</sup> The Weather Channel conducted surveys in December 1995 which showed that some consumers preferred no voice during the local forecast. In fact, some consumers indicated that they would turn the sound off if The Weather Channel added meteorological voice-overs.

<sup>24</sup> The local forecasts are customized and simultaneously broadcast to more than 4,000 National Weather Service zones throughout the country.

occupy the lower 1/3 of the television screen 90 to 100 percent of the time. This new service also will be entirely textual and graphic.

The same is true of The Weather Channel's emergency weather bulletins. These bulletins, which are the most vital service provided by The Weather Channel, contain potentially life-saving information and are sent to viewers within seconds of the time they are issued by the National Weather Service. The Weather Channel also broadcasts emergency educational messages such as what to do in a hurricane, tornado, earthquake, etc. Both the emergency warnings and the emergency educational messages are provided in full-screen text form. Further, the emergency bulletins are followed by an on-going crawl containing the severe weather information at the bottom 1/3 of the screen. There is no additional audio support. Thus, all viewers, including the hearing impaired, can easily read and understand the information.

In the NPRM, the Commission asks whether the safety related nature of weather programming should create a presumption that such programming should be captioned. This is primarily a local weather issue, since non-local weather does not present potential safety danger to viewers. The Commission expressed the concern that, without captions, a hearing-impaired person "must guess at the significance of information concerning storm alerts and instructions from emergency management personnel."<sup>25</sup> With

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<sup>25</sup> See NPRM at ¶ 68.

respect to The Weather Channel, however, this concern is entirely unfounded. All essential local and emergency weather information provided by The Weather Channel is displayed entirely in textual form.<sup>26</sup> There is nothing to caption with respect to local and emergency weather programming.

2. National And International Weather Is Adequately Conveyed In Textual Form.

The Weather Channel's national weather programming is communicated with extensive graphs, labels, scales, color-codes, charts, etc. The audio descriptions accompanying these textual and graphic representations are usually repetitive of, and serve merely to reinforce the information conveyed in the on-screen charts, graphs and text. Approximately 70% of The Weather Channel's national and international programming is accompanied by substantial textual and graphic descriptions. In that sense, this programming already is effectively captioned.

Less than five percent of The Weather Channel's 24-hour programming is purely audio. In most cases, this audio content consists of on-camera personalities introducing the in-studio weatherperson or a video clip of a correspondent on location. During morning viewing hours, these video clips average 30

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<sup>26</sup> The Commission's emergency alert system rules require broadcasters and cable operators to display emergency information visually at the top of the screen. See 47 C.F.R. §§ 11.51(c)(1), (g)(3). The Weather Channel complies with those rules.

seconds per hour. In the evening, they may last two minutes per hour.

Given the substantial textual and graphic redundancy of the audio for the vast majority of The Weather Channel's national and international weather programming, this programming must be considered accessible to the hearing impaired.

3. Closed Captions Could Significantly Reduce The Quality Of The Weather Channel's Programming.

Captioning of The Weather Channel actually could reduce the quality of its programming for the hearing impaired. The Weather Channel uses the entire screen to convey important information to its viewers.<sup>27</sup> Covering up any part of the screen would disrupt the viewing experience and block access to critical information.<sup>28</sup> As noted, a primary viewer complaint is map blockage, even by The Weather Channel's on-air talent. A closed captioning bar would provide a constant impediment and substantially reduce the value of the information conveyed by The

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<sup>27</sup> See Attachments A-G.

<sup>28</sup> See id. As shown in the attachments, the addition of closed captioning to The Weather Channel's programming would block important information on its maps and graphics or text, thereby severely impairing the content offered to hearing-impaired viewers.

Weather Channel's programming.<sup>29</sup> The Report expressly recognized this problem.<sup>30</sup>

Furthermore, The Weather Channel's new scrolling local feed overlay (described above), will occupy the lower 1/3 of the television screen 90-100% of the day. Captioning the lower 1/3 of the television screen would effectively eliminate this important local and emergency information source for the deaf and hearing impaired. Placement of captioning at the top 1/3 of the screen poses a similar detriment to hearing-impaired viewers. Such placement would conceal the title and/or significant portions of weather maps, charts and other essential on-screen graphics. Furthermore, top-screen captioning would obscure the weatherperson's head, thereby hindering the possibility of lip reading.

The significant blockage of information that would result from closed captioning is demonstrated by the pictorial examples of The Weather Channel's programming contained in Attachments A-G.

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<sup>29</sup> The NPRM recognizes that "[c]aptions . . . should not interfere with the viewability of the video portion of the program." See NPRM at ¶ 111.

<sup>30</sup> See Report at ¶ 89 ("Open character generated announcements, such as emergency messages, election results, weather advisories and school closing information, which crawl across the bottom of the screen are obscured by captions."). See also Report at ¶ 15 ("Closed captions may also cover other written information on the screen, such as emergency weather or school closing announcements.").

Finally, closed captioning for live programming is subject to frequent inaccuracies.<sup>31</sup> In addition, as noted, live captioning appears on the television screen about three seconds after the corresponding audio.<sup>32</sup> This results in captions not being synchronized with the video portion of the program,<sup>33</sup> a factor that could confuse and mislead the hearing impaired about critical weather news. Indeed, the Commission has stated that "[u]nless closed captions accurately reflect the audio portion of the video programming to which they are attached, they may be of limited use to the viewer."<sup>34</sup> That statement would be especially true for the type of live up-to-the-minute weather offered by The Weather Channel.

4. The Weather Channel Offers The Hearing Impaired Alternative Means To Access Its Programming.

Congress specifically instructed the Commission to take into account "the existence of alternative means of providing access to the hearing impaired" when considering exemptions to closed

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<sup>31</sup> See Report at ¶ 14. The Caption Center's website notes that "even the best and most experienced stenocaptioner can produce up to two errors every minute." See <http://www.boston.com/wgbh/pages/captioncenter/ccsolving.html> at 3 (noting also that with stenocaptioning "a few errors are unavoidable.").

<sup>32</sup> See Report at ¶ 45.

<sup>33</sup> See Report at ¶ 15.

<sup>34</sup> See Report at ¶ 87. "When there are typographical errors or incorrect word usage, the reader does not have the time to look over the previous words to deduce the intended meaning." Id.

captioning.<sup>35</sup> The Weather Channel's Internet website provides access to hearing-impaired viewers, allowing them to obtain local, national and international weather reports.<sup>36</sup> The website is updated at least every hour to ensure the freshness of its reports. Additionally, the website contains business traveler forecasts, ski reports, local radar, full-color national and international satellite photos and maps, weather news stories, airport delays, aviation reports, health and safety updates, and weather-related educational articles.<sup>37</sup> Viewers may also obtain week-long weather forecasts for any U.S. state (further divided into regional weather reports) and over 110 countries. The Weather Channel has designed the website to be intensely interactive and user-friendly.

The Weather Channel's website is one of the most-visited sites on the World-Wide Web. PC-Meter, which provides audience measures of World-Wide Web sites, reports that The Weather Channel's website is the third most visited site in the news/information/entertainment category.<sup>38</sup> Each day, there are approximately 250,000 visits to the website and over twenty-five

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<sup>35</sup> See Conference Report at 183 (discussing and adopting House Report).

<sup>36</sup> The website's domain name is <http://www.weather.com>. Attachment H contains examples of the information available at the website.

<sup>37</sup> See Attachment H.

<sup>38</sup> PC-Meter data is included as Attachment I.

million pageviews per month.<sup>39</sup> The Weather Channel's website provides the very type of alternative access for which Congress intended an exemption to be granted.

**III. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 713(d), AS WELL AS ADMINISTRATIVE EFFICIENCY, REQUIRE THE COMMISSION TO EXEMPT THE WEATHER CHANNEL FROM ANY CLOSED CAPTIONING REQUIREMENTS IN THIS PROCEEDING.**

As shown above, The Weather Channel qualifies for an exemption pursuant to Section 713(d)(1) from any closed captioning requirement. As discussed below, Section 713(d)(1) permits the Commission to use the instant proceeding to exempt individual programs such as The Weather Channel from any requirement of closed captioning. That conclusion is supported by the statute's plain language, its legislative history, and public policy considerations.

It is axiomatic that the first step in statutory construction is to examine the statute's plain language.<sup>40</sup> Section 713(d)(1) provides that:

[T]he Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.<sup>41</sup>

Thus, Section 713(d)(1) unambiguously grants the Commission the authority to use this proceeding to exempt individual "programs"

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<sup>39</sup> See Attachment I.

<sup>40</sup> See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

<sup>41</sup> 47 U.S.C. § 613(d)(1) (emphasis added).



and "services" where the provision of closed captioning would be "economically burdensome."

In the NPRM, however, the Commission proposed rules permitting it to exempt only "classes of programming."<sup>42</sup> The NPRM's treatment of Section 713(d)(1) did not contain any discussion concerning exemptions for "programs" or "services" as provided for in Section 713(d)(1). Nor did the Commission provide any explanation for its apparent decision not to utilize its exemption power with respect to "programs" or "services." If the Commission adheres to this approach in its final order, it would be arbitrarily reading out of the statute the terms "programs" and "services" and abrogating the responsibilities delegated to it by Congress.<sup>43</sup> Instead, the Commission should exercise its full statutory powers and exempt in this proceeding "programs" or "services," such as The Weather Channel, which demonstrate that captioning would impose an economic burden pursuant to Section 713(d)(1).

The legislative history to Section 713(d)(1) further demonstrates that Congress purposely granted the Commission the statutory responsibility to exempt "programs" or "services" for

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<sup>42</sup> See NPRM at ¶ 70.

<sup>43</sup> See Astoria Fed'l Savings & Loan v. Solimino, 501 U.S. 104, 112 (1991) (Statutes should be construed "so as to avoid rendering superfluous any parts thereof.") (citation omitted).